

Civil Division-Kent County (739-7641)

January 9, 2006

Mr. William B. Chandler, III
600 Main Street
P.O. Box 87
Dagsboro, DE 19939

Re: **Freedom of Information Act Complaint
Against Town of Dagsboro**

Dear Mr. Chandler:

Our Office received your complaint on November 8, 2005 alleging that the Town of Dagsboro ("the Town") violated the Freedom of Information Act, 29 *Del. C.* Chapter 100, by: (1) failing to prepare minutes of executive sessions since June 2004; (2) providing you with redacted copies of executive session minutes after they were prepared almost one year later even though, you assert, disclosure of the complete minutes at this time would not defeat any lawful purpose for executive session; and (3) discussing matters of public business in executive session for a purpose not authorized by law.¹

¹ As the Chancellor of the Chancery Court, we would normally address you as "Your Honor." You made it clear when you filed your complaint with our Office that you were doing so as a resident of the Town of Dagsboro.

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By letter dated November 9, 2005, we asked the Town to respond to your complaint by November 21, 2005 and provide us with unredacted copies of the executive session minutes for our *in camera* review. We received the Town's response by facsimile on November 21, 2005 together with the unredacted executive session minutes we requested.

On November 28, 2005, we asked the Town to provide us with the minutes of an August 29, 2005 executive session which the Town Council approved at a meeting on November 21, 2005, and to update the status of two matters discussed in executive session at earlier meetings. We received this additional information by letter dated November 30, 2005. The Town provided us with a complete copy of the August 29, 2005 executive session for our *in camera* review, as well as a redacted copy available to the public.

By letter dated August 24, 2005 to Mayor Connor, you asked for "copies of the minutes of every executive session meeting of the Town Council since June 30, 2004. Of course, if the minutes include discussions of personnel issues (involving job performance, competence or ability), I recognize that the Town may properly redact such portions of the minutes. If other portions of the executive session minutes are to be redacted, the Town must identify (1) the precise basis for the claimed exemption *and* (2) how disclosure 'would defeat the lawful purpose for the executive session.'"

Mayor Connor responded to you in an undated letter stating: "The Council will be reviewing draft executive session minutes and, once they are approved, will ask the Town Solicitor to forward any redacted minutes that are available to you."

By letter dated October 24, 2005, the Town Solicitor forwarded you "the following redacted

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executive session minutes: July 26, 2004; September 27, 2004; October 12, 2004; October 25, 2004; November 22, 2004; December 20, 2004; January 31, 2005; February 28, 2005; April 25, 2005; July 18, 2005; September 8, 2005.”

According to the Town, when the Mayor first received your August 24, 2005 FOIA request he discovered “that minutes for executive sessions had not been prepared due to miscommunication amongst Council and to staff.” The Town Solicitor then prepared minutes of those executive sessions based on her personal notes. The Town Council reviewed and approved those minutes at its meeting on October 24, 2005, with the exception of the minutes for the August 29, 2005 executive session. The Town approved the minutes of the August 29, 2005 executive session at a meeting on November 21, 2005.

According to the Town, “[t]here were no executive sessions held on August 23, 2004; March 8, 2005, or June 27, 2005. Mr. Chandler has already received the minutes from May 23, 2005, as part of a response to his prior request and as further reviewed by your office during the summer of 2005.” ²

The Town contends that it redacted those portions of the executive session minutes provided to you which discussed matters authorized for private discussion under FOIA, such as personnel matters, litigation strategy, and site acquisitions. The Town contends that public disclosure of those matters at this time would defeat the lawful purpose for the executive sessions.

The redactions in the minutes all reflect matters that
are still pending as acquisition of property or litigation

² “It has been our historical practice to accept such representations from an attorney for ‘the custodian of public records to determine that such documents do not exist for purposes of FOIA.’” *Att’y Gen. Op.* 05-IB19 (Aug. 1, 2005) (quoting *Att’y Gen. Op.* 97-IB01 (Jan. 14, 1997)).

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or are protecting employee and staff privacy rights. Requiring the Town to discuss or make public the minutes of discussions on matters still pending will either limit the options Town Council may have with respect to such matters or chill the level of discussion of these subjects if they must be held in public.

Letter dated November 21, 2005 from Tempe Brownell Steen, Esquire to Deputy Attorney General W. Michael Tupman, at p.7.

Relevant Statutes

FOIA requires all public bodies to “maintain minutes of all meetings, including executive sessions” and to “make such minutes available for public inspection and copying as a public record.”

29 *Del. C.* §10004(f).

FOIA exempts from the definition of a public record “any record of discussions held in executive session pursuant to subsections (b) and (c) of Section 10004 of this title” but “[s]ubject to subsection (f) of Section 10004.”

Subsection (f) of Section 10004 provides: “Such minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section, may be withheld from public disclosure so long as public disclosure would defeat the lawful purpose for the executive session, but not longer.” 29 *Del. C.* §10004(f).

Legal Authority

A. Timely Preparation of Minutes

“FOIA does not set a time limit for a public body to prepare minutes of its meetings. We believe that a reasonable time is by the time of the public body’s next regularly scheduled meeting. We can understand why, because of personnel absences, the minutes of a particular meeting might be

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delayed.” *Att’y Gen. Op.* 03-IB05 (Feb. 5, 2003). In that case, however, the Town Council had “not adequately explained why it did not prepare and approve minutes of fifteen meetings in 2002 for periods ranging from two to seven months.” *Id.*

Here, the Town did not prepare minutes of eleven executive sessions for over one year. The Town explains that it has “a small staff and limited resources” while the “demands on the Town Council and staff have grown immensely.” Responding to FOIA requests may require additional administrative time for a public body, but the preparation of timely minutes of meetings “is not a technical detail. The minutes serve the important purpose of letting the general public know when and where to find an official accounting of the business that transpired.” *Att’y Gen. Op.* 03-IB05 (Feb. 5, 2003). Moreover, “[t]o the extent that a public body does not keep a contemporaneous record of the subjects discussed at an executive session but rather relies on memory of those in attendance, the public body runs the risk of failing to meet its burden of proving that its action was justified when the propriety of an executive session is challenged.” *Common Cause of Delaware v. Red Clay Consolidated School District*, C.A. No. 13798, 1995 WL 733401, at p.4 (Del. Ch., Dec. 5, 1995) (Balick, V.C.).

We determine that the Town violated FOIA by not preparing timely minutes of executive sessions from June 2004 through August 2005 without adequately explaining why it could not have done so. No remediation is required because the Town has since prepared minutes of those executive sessions. We trust that “changes in the Town’s administrative practices will make sure that this problem does not recur in the future.” *Att’y Gen. Op.* 03-IB05 (Feb. 5, 2003).

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B. Redactions of Executive Session Minutes

We have reviewed *in camera* the minutes of executive sessions held by the Town Council from June 2004 through September 2005. The Town provided you with unredacted copies of the minutes of three of those sessions (October 12, 2004; October 25, 2004; and July 25, 2005) so they are not at issue for purposes of the public records requirements of FOIA. We have compared the unredacted and redacted versions of the minutes of the remaining executive sessions.

Under FOIA, “the burden of proof shall be on the custodian of records to justify the denial of access to records.” 29 *Del. C.* §10005(c). We do not believe that the Town has met its burden of proof to justify redacting portions of some of the executive session minutes you requested because the Town “has not articulated reasonable and legitimate reasons why public disclosure of the executive session minutes at this time would defeat any lawful purposes for those executive sessions.” *Att’y Gen. Op.* 05-IB26 (Aug. 29, 2005).

July 26, 2004

In paragraphs 5, 6, and 7 the Town Council discussed potential site acquisitions for the town hall/fire hall, which FOIA authorizes for discussion in executive session. *See* 29 *Del. C.* §10004(b)(2). According to the Town, the “status of the town hall/fire hall site acquisition matter is still open.”

In *Att’y Gen. Op.* 02-IB27 (Nov. 4, 2002), the county council met in private to discuss the purchase of properties, a matter authorized by FOIA for executive session. *See* 29 *Del. C.* §10004(b)(2). The county contended that public disclosure of the minutes would defeat the lawful

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purpose of executive session because “the matters addressed in the executive session are not concluded and negotiations are ongoing.” We agreed, but observed that “[a]t some point after the County has purchased the property, the minutes of prior executive sessions regarding the purchase of the property may become subject to FOIA because disclosure would no longer ‘defeat the lawful purpose for the executive session.’” *Att’y Gen. Op. 02-IB17 (quoting 29 Del. C. §10004(f))*.

Based on this standard, we determine that disclosure of paragraphs 5, 6, and 7 of the minutes of the July 14, 2004 executive session at this time would defeat the lawful purpose of the executive session because those matters are likewise not concluded and the negotiations are ongoing.

In paragraph 4, the Town redacted the names of several persons who attended the executive session. FOIA requires the minutes of the meeting of a public body “to include a record of those members present.” *29 Del. C. §10004(f)*. “While FOIA refers only to a record of ‘members’ of the public body present, we believe that in order to meet its burden of proof for lawfully meeting in executive session, a public body must disclose any non-members who are present as well.” *Att’y Gen. Op. 05-IB26 (Aug. 29, 2005)*.

We determine that FOIA requires disclosure of all names of the persons present, and redaction of names in paragraph 4 of the minutes of the July 26, 2004 executive session was improper.

September 27, 2004

In paragraph 5, the Town Council discussed a potential site acquisition. According to the Town, the “status of the town hall/fire hall site acquisition matter is still open.” We determine that disclosure of paragraph 5 of the minutes of the September 27, 2004 executive session at this time

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would defeat the lawful purpose of the executive session because the matter is not concluded and negotiations are ongoing.

November 22, 2004

In paragraphs 6 and 7, the minutes reflect that the Town Council discussed various police matters. We have previously determined that a Town Council cannot use executive session under FOIA to discuss general police administrative matters such as town coverage and work schedules. See Att’y Gen. Op. 05-IB29 (Oct. 13, 2005) (citing Att’y Gen. Op. 02-IB12 (May 21, 2002)). In the absence of evidence that the Council discussed the competence or ability of any individual police officer, use of executive session was inappropriate. Under FOIA, the minutes of executive session “would be exempt from disclosure only if the discussions pertained to a lawful purpose for holding the executive session.” *Chemical Industry Council of Delaware, Inc v. State Coastal Zone Industrial Control Board*, C.A. No. 1216-K, 1994 WL 274295, at p.13 (Del. Ch., May 18, 1994) (Jacobs, V.C.) Because FOIA does not authorize discussion of administrative police matters in private session, we determine that paragraphs 6 and 7 of the minutes of the November 22, 2004 executive session must be made available to the public.

December 20, 2004

In paragraph 6, the Town Council discussed a potential site acquisition. According to the Town, the “status of the town hall/fire hall site acquisition matter is still open.” We determine that

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disclosure of paragraph 6 of the minutes of the December 20, 2004 executive session at this time would defeat the lawful purpose of the executive session.

January 31, 2005

In paragraph 3, the Town Council discussed a potential site acquisition. According to the Town, the “status of the town hall/fire hall site acquisition matter is still open.” We determine that disclosure of paragraph 3 of the minutes of the January 31, 2005 executive session at this time would defeat the lawful purpose of the executive session because negotiations are ongoing.

In paragraph 4, the Town Council discussed filing a lawsuit to enforce a zoning ordinance. According to the Town, the property owner has since “brought his property into compliance with the Zoning Code.” Even though the Town did not sue, we believe that disclosure of paragraph 4 of the minutes of the January 31, 2005 executive session could “have an adverse effect on the bargaining or litigation position of the public body,” 29 *Del. C.* §10004(b)(4). Disclosure at this time would defeat the lawful purpose for the executive session.

February 28, 2005

In paragraphs 3 and 4, the Town Council discussed various police department administrative matters none of which FOIA authorizes for discussion in private. We determine that paragraphs 3 and 4 of the minutes of the February 28, 2005 executive session must be made available to the public.

April 25, 2005

In paragraph 4, the Town Council discussed police department standard operating procedures, personnel policy, weekly scheduling, and monthly reports, none of which FOIA authorizes for

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discussion in private. We determine that paragraph 4 of the minutes of the April 25, 2005 executive session must be made available to the public.

In paragraph 5, the Town Council discussed the potential litigation authorized at the Council's January 31, 2005 meeting. According to the Town, the property owner has since "brought his property into compliance with the Zoning Code." Even though the Town did not sue, we again conclude that disclosure of paragraph 5 of the minutes of the April 25, 2005 executive session may have an adverse effect on the bargaining or litigation position of the public body and therefore is protected from disclosure.

July 18, 2005

In paragraphs 2-5, the Town discussed personnel matters which FOIA authorized for discussion in executive session. We believe that given the nature of these personnel matters, disclosure of paragraphs 2-5 of the July 18, 2005 executive session minutes at this time would defeat the lawful purpose of the executive session because the Town Council discussed the "names, competency and abilities of individual employees." *See 29 Del. C. §10004(b)(9)*.

August 29, 2005

In paragraphs 1 and 2, the Town discussed contract negotiations with a utility. According to the Town, "Mr. Hauser, the Town's consulting engineer, has taken the lead in these negotiations and it is still pending." We conclude that paragraphs 1 and 2 of the minutes of the August 29, 2005 executive session are protected at this time from public disclosure since disclosure may have an adverse effect on the Town's bargaining position while contract negotiations are ongoing.

September 8, 2005

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In paragraphs 4-6, the Town Council discussed personnel matters which are proper for private discussion under FOIA. We believe that given the nature of those personnel matters, public disclosure at this time would defeat the lawful purpose of the executive session.

C. Matters Authorized for Executive Session

Based on the unredacted portions of the executive session minutes provided to you, you allege that during executive sessions the Town Council discussed matters that “do not fall within any of the recognized exceptions under 29 *Del. C.* §10004(b),” specifically: (1) a personnel handbook (September 27, November 22, and December 20, 2004 and April 25, 2005); (2) delinquent taxes (December 20, 2004 and February 28, 2005); and (3) the hiring of a town administrator and the circumstances surrounding his subsequent resignation (October 12 and 25, 2004 and July 25, 2005). With one exception (July 25, 2005), these alleged violations occurred more than six months before the date of your FOIA complaint (November 8, 2005).

The enforcement section of FOIA provides that any suit for an alleged violation of the Act’s open meeting provisions must be brought “within 60 days of the citizen’s learning of such action but in no event later than 6 months from the date of the action.” 29 *Del.C.* §10005(a). This statutory limitation reflects the practical reality that citizens often rely on decisions made by public bodies during their public meetings and it would be unfair to them if the decisions upon which they have relied could be challenged at any future time. *See Wilmington Federation of Teachers v. Howell*, 374 A.2d 832, 836 (Del. 1977) (“Both citizens and officials rely on governmental decisions in planning their everyday affairs, and to allow subsequent invalidation of such decisions . . . would create a substantial amount of undesirable uncertainty.”)

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For similar policy reasons, our Office historically has declined to investigate FOIA complaints of a violation of the open meeting laws where the alleged violation took place more than six months before our Office received the complaint. *See, e.g., Att’y Gen. Op. 05-IB26* (Aug. 29, 2005); *Att’y Gen. Op. 02-IB10* (Apr. 24, 2002).

The same policy considerations do not apply to a complaint to our Office alleging a violation of the public records provisions of FOIA. Other members of the public do not rely to their detriment on a decision by a public body not to disclose public records. To the extent that our discussion in *Att’y Gen. Op. 05-IB26* (Aug. 29, 2005) did not distinguish between public records and open meetings, we do so now.³

When the complaint concerns the disclosure of the minutes of an executive session, both the open meeting and the public records requirements of FOIA may be implicated. The minutes of an executive session may be subject to public disclosure if disclosure at this time would not defeat the lawful purpose for the executive session, or if FOIA did not authorize discussion of that matter of public business in private. In the latter case, we must conclude that the public body violated both the open meeting requirements of FOIA (unauthorized executive session) and the public records requirements of FOIA (the minutes of the executive session are not exempt from disclosure). In keeping with the public policy considerations underlying our six-month rule, our Office will not require remediation for the open meeting violation, but will require that the public body make the minutes of the unauthorized executive session available to the public.

We agree that FOIA did not authorize the Town Council to meet in executive session to

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discuss a personnel handbook and delinquent taxes. *See Att’y Gen. Op.* 05-IB24 (Aug. 18, 2005) (“Discussion of the handbook would not have come under the ‘personnel’ exception for executive session because it did not involve discussion of the ‘names, competency and abilities of individual employees’”) (*quoting* 29 *Del. C.* §10004(b)(9)); *id.* (“We determine that FOIA did not authorize the Town Council to meet in executive session to discuss [a delinquent taxpayer].”)

We do not agree that FOIA prohibits discussions in executive session on October 12 and 25, 2004 concerning the hiring of a new town administrator. Those discussions involved “an individual citizen’s qualifications to hold a job.” 29 *Del. C.* §10004(b)(1). We also approve the discussion in executive session on July 18, 2005 of the circumstances leading to the town administrator’s resignation. That discussion involved “the names, competency and abilities of individual employees.” *Id.* §10004(b)(9).

Finally, our review of the unredacted minutes of the executive sessions (to which you were not privy) revealed that the Town Council discussed police matters on November 22, 2004 and February 28 and April 25, 2005 which, under FOIA, were not proper for private discussion.

D. Remediation

We decline to direct remediation for the Town Council’s discussion of matters of public business in executive session which FOIA did not authorize for private discussion for those requests based upon our six-month rule. With the exception of the July 25, 2005 meeting, all of the violations took place more than six months prior to our receiving your complaint. We have determined that the Town Council lawfully met in executive session on July 25, 2005 to discuss a personnel matter.

³ We note there may be egregious circumstances where we might feel compelled to waive our six-month

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There is a nexus, however, between some of the open meeting violations and the public records violations. For example, to the extent FOIA permits the Town Council to discuss a matter in executive session, disclosure of the executive session minutes at this time may no longer defeat the lawful purpose of executive session. The six-month rule will not apply to our directive to make public those portions of executive session minutes which the Town previously redacted.

We direct the Town to provide to you a redacted copy of the minutes of the August 29, 2005 executive session, and to provide you with redacted copies of the minutes of executive sessions to include the following portions: July 26, 2004 (paragraph 4, names of attendees); November 22, 2004 (paragraphs 6 and 7); February 28, 2005 (paragraphs 3 and 4); and April 25, 2005 (paragraph 4).

Conclusion

For the foregoing reasons, we determine that the Town violated the requirements of FOIA by: (1) failing to prepare minutes of executive sessions in a timely manner; (2) not making portions of those minutes available to the public; and (3) discussing matters in executive session which FOIA does not authorize for private discussion.

No remediation is necessary for the first violation because the Town has since prepared minutes for those executive sessions. We do not direct remediation for the third violation because the executive sessions took place more than six months prior to our receiving your FOIA complaint.

For the second violation, we direct as remediation that, within ten days of the date of this letter, the Town provide you with a redacted copy of the minutes of the August 29, 2005 executive session, and redacted copies of the minutes of the executive sessions held on July 26, 2004,

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November 26, 2004, February 28, 2005, and April 25, 2005 consistent with our analysis above. We direct the Town Solicitor to notify us in writing within ten days after the Town has completed remediation.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Keith R. Brady, Esquire
Assistant State Solicitor

cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin
Chief Deputy Attorney General

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